

**ONTARIO
SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)**

**IN THE MATTER OF THE *COMPANIES' CREDITORS ARRANGEMENT ACT*,
R.S.C. 1985, c. C-36, AS AMENDED**

**AND IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF
TACORA RESOURCES INC.**

Applicant

**FACTUM OF THE AD HOC GROUP OF NOTEHOLDERS
(MOTION RETURNABLE OCTOBER 24, 2023)**

October 22, 2023

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TO: SERVICE LIST

FACTUM OF THE AD HOC GROUP OF NOTEHOLDERS

PART I: OVERVIEW

1. This factum is submitted on behalf of the ad hoc group (the "AHG") of holders (the "Noteholders") of 8.250% Senior Secured Notes due May 15, 2026 and 9.00% Cash / 4.00% PIK Senior Secured Priority Notes due 2023 ("SPNs"), issued by Tacora Resources Inc. ("Tacora" or the "Company"). The AHG holds the majority of both series of Notes. The Noteholders are overwhelmingly Tacora's largest senior secured creditors, being owed greater than \$260 million – more than seven (7) times the amount owed to Tacora's other senior secured creditor, Cargill International Trading PTE Ltd. ("Cargill" – Cargill's proposed financing is from its parent, Cargill Incorporated – the "Cargill DIP").

2. To cut to the core of the dispute, the relief sought by Tacora on this comeback hearing is *extraordinary and unprecedented*. Tacora seeks approval of debtor in possession ("DIP") financing by Cargill that would prime the senior secured Noteholders to the extent of more than \$75 million in circumstances where the AHG offered DIP financing that was not only commercially reasonable but actually accepted by Tacora and put before the Court in Tacora affidavits for approval a mere month ago. Tacora's reversal in favour of a last-minute Cargill DIP:

- (i) was done outside of Tacora's carefully-designed DIP solicitation process in which the AHG followed all the rules and had its DIP proposal selected by Tacora, endorsed by Tacora's financial advisors, and put forward to the Court for approval;
- (ii) followed multiple points of unusual "offline" contact between senior Cargill and Tacora executives;
- (iii) occurred at the same time as Cargill was withholding millions of dollars of payments owing to Tacora in order to leverage Cargill's position and put extreme pressure on Tacora;

- (iv) emerged from a Tacora board of directors meeting in which Cargill's board appointee did not recuse himself from any of the board deliberations about the Cargill DIP (he remained present during the vote, but did not vote); and
- (v) moreover, it emerged on cross-examination that Tacora's CEO had deleted all of his text messages exchanged with Cargill executives in respect of this Cargill DIP.

3. There are several serious process, governance and substantive problems underlying the requested relief before the Court.

4. By way of most recent procedural background, on October 10, 2023, Tacora obtained an initial order under the CCAA which included the Cargill DIP. The application record for the initial order hearing was provided on only a few hours' notice to the AHG, which reserved all of its rights to challenge the amended and restated initial order ("ARIO") now sought *de novo* by Tacora on this comeback hearing.

5. In addition, the AHG has now brought a cross-motion seeking approval of its proposed amended and restated initial order (the "AHG ARIO") which, among other thing, would approve DIP financing to be provided by the AHG (the "AHG DIP"). The terms of the AHG DIP are (save for necessary date and contextual updating) equivalent to the September 11, 2023 Tacora-AHG binding DIP Agreement that was unanimously approved by the board of directors of Tacora, endorsed by the proposed Monitor and Tacora's financial advisor (Greenhill & Co. Canada Ltd., "Greenhill"), and submitted to the Court for approval on September 11 in supporting affidavits sworn by Tacora's CEO and the managing director of Greenhill.

6. The Tacora-AHG DIP Agreement was the final result of a solicitation process for DIP financing designed and run by Greenhill, with detailed terms and milestones, in which Cargill participated but acting in its own interest ultimately chose not to submit a binding proposal to

Tacora to provide urgent and desperately required DIP financing. At the very same time that Cargill withdrew from Tacora's August-September DIP process, Cargill was withholding millions of dollars in payments owing to Tacora on delivered iron ore, to put extreme pressure on Tacora – something Cargill later did once again in October surrounding the Cargill DIP.

7. In the alternative, if the AHG ARIO is not granted, the AHG is seeking:¹

- (a) A declaration or directions that any DIP financing proposal not prevent or hinder the disclaimer of the Offtake Agreement (as defined below);
- (b) A declaration that the AHG's terms for a key employee retention plan ("KERP") be implemented; and
- (c) Approval of the appointment of a chief restructuring officer ("CRO"), if the Court thinks it advisable, as well as certain other ancillary relief.

8. This *de novo* comeback hearing requires the Court to consider whether the Cargill DIP ought to be approved or whether the AHG DIP is more appropriate in the circumstances. Tacora bears the burden of the relief it seeks. The AHG submits that: (a) the process leading to the approval of the Cargill DIP was gravely flawed; (b) the Cargill DIP does not meet the factors in ss. 11.2(4) of the CCAA, in that it seriously prejudices the senior secured Noteholders; and (c) the Cargill DIP is being used for an improper purpose – to further leverage Cargill's own commercial interests, rather than benefit Tacora. In these circumstances, the AHG ARIO ought to be approved.

9. The AHG ARIO should be implemented, or the alternative relief proposed by the AHG adopted, in order to ensure an even playing field for all stakeholders while the Company works to complete a successful restructuring for the benefit of all of its employees and stakeholders.

¹ For greater clarity, the AHG does not oppose the Company having the benefit of protection under the CCAA generally.

PART II: FACTS

A. Overview of Tacora's Debt Structure

10. Tacora is an Ontario corporation; its sole operating asset is the Scully Mine near Wabush, Newfoundland and Labrador.² Tacora produces a high grade iron-ore concentrate that commands a market premium, and for which there are interested buyers all over the world.³ Tacora's largest creditors are the Noteholders, which are owed approximately \$261 million in secured debt. At the first lien level, there is currently \$27 million of SPNs outstanding. At the second lien level, there is currently \$225 million of Senior Secured Notes outstanding, plus over \$16 million in accrued and unpaid interest. All references to \$ means USD.

11. Cargill is, among other things, party to an Iron Ore Sale and Purchase Contract with the Company, dated November 11, 2018 (as amended, the "Offtake Agreement") and the Advance Payments Facility Agreement with the Company, dated January 3, 2023 (the "APF"). Cargill is owed approximately \$5 million at the first lien level under its Senior Secured Hedging Facility and \$30 million under the APF at the second lien level.⁴ The secured debt of the lender under the Cargill DIP – Cargill, Incorporated (prior to the Cargill DIP) – was nil.⁵ It is believed that Cargill, Incorporated is the parent of Cargill.⁶

12. A cast of characters describing the various relevant stakeholders in Tacora, including the witnesses who were examined for purposes of this motion, is attached as Appendix "A".

² Transcript of the Cross-Examination of Joe Broking held October 19, 2023 ("Broking Cross Transcript"), pgs. 15-16

³ Broking Cross Transcript, pg. 17

⁴ Affidavit of Joe Broking, sworn October 9, 2023, para 67

⁵ Broking Cross Transcript, pgs. 24-25

⁶ Transcript of the Cross-Examination of Chetan Bhandari, held October 18, 2023 ("Bhandari Cross Transcript"). pg. 87; Transcript of the Rule 39.03 Examination of Paul Carrelo, held October 19, 2023 ("Carrelo 39.03 Transcript"), pgs. 42-43.

B. Cargill and the Offtake Agreement

13. Pursuant to the Offtake Agreement, Cargill purchases 100% of the iron-ore produced at the Scully Mine. The Offtake Agreement was amended in 2020 to extend the duration of the Offtake Agreement until the Mine is no longer economically viable (i.e. a "life of mine" agreement).⁷

14. The Offtake Agreement is highly profitable for Cargill. Between August 2019 and February 2023, Cargill's profit share under the Offtake Agreement, in respect of iron ore tonnage alone, totaled almost [REDACTED].⁸ Cargill has additional sources of revenue and profit under related agreements with Tacora.⁹ In contrast, Tacora has operated at a net loss for years.¹⁰

15. Cargill has an interwoven and multifaceted relationship with Tacora. Cargill provides forms of financing and credit, margining and hedging to Tacora,¹¹ under the various agreements between Tacora and Cargill, including the Offtake Agreement, the APF, the Stockpile Agreement and the Wetcon Agreement. Two Cargill entities are equity-holders in Tacora.¹² Cargill is described as a "related party" under IFRS standards in Tacora's financial statements.¹³

16. Tacora's former co-founder, Chief Operating Officer, and Chief Commercial Officer, Matt Lehtinen, was hired by Cargill in 2023 and has responsibility for Cargill's relationship with Tacora.¹⁴ Numerous Cargill employees are on-site on a day-to-day basis in connection with the management of the Scully Mine.¹⁵ Cargill has also had a representative on Tacora's board of

⁷ Broking Cross Transcript, pgs. 18-19

⁸ Bhandari Cross Transcript, pgs. 22-25

⁹ Bhandari Cross Transcript, pg. 27; Transcript of the Rule 39.03 Examination of Leon Davies ("Davies 39.03 Transcript"), pg. 33

¹⁰ Broking Cross Transcript, pg. 76

¹¹ Affidavit of Joe Broking, sworn October 9, 2023, Exhibit "K"

¹² Affidavit of Joe Broking, sworn October 9, 2023, Exhibit "B"

¹³ Affidavit of Joe Broking, sworn October 9, 2023, Exhibit "E"

¹⁴ Davies 39.03 Transcript, pgs. 61-62

¹⁵ Affidavit of Joe Broking, sworn October 9, 2023, para 136

director ("Board") for many years, including during the period that amendments were made to the Offtake Agreement, and throughout the DIP Process (defined below).

17. Cargill's representative, Leon Davies, participated in *all* Tacora Board meetings throughout the DIP Process, including the meeting to approve the Cargill DIP. Notwithstanding Mr. Davies' status as a Cargill employee, and Cargill's prominent role in the restructuring process, Mr. Davies never recused himself from *any part* of Tacora's numerous Board meetings regarding the CCAA filing and proposed DIP financings.¹⁶

C. Tacora's Restructuring Efforts

18. Greenhill was engaged by Tacora in January 2023 to act as financial advisor and investment banker to Tacora.¹⁷ Greenhill was instructed by Tacora's Board.¹⁸ Consistent with its mandate, Greenhill sought interested purchasers for Tacora. One potential strategic purchaser entered into a letter of intent with Tacora, and conducted due diligence. The potential purchaser withdrew from the potential acquisition, including due to concerns about the Offtake Agreement.¹⁹

19. Despite the obvious concerns about the Offtake Agreement, Cargill has been unwavering in its refusal to amend the "life of mine" term of the Offtake Agreement.²⁰ While initially resistant to the proposition that disclaiming the Offtake Agreement would provide Tacora with greater flexibility for a potential restructuring, Greenhill's managing director, Chetan Bhandari, eventually conceded the obvious: it would.²¹

¹⁶ Davies 39.03 Transcript, pg. 100

¹⁷ Bhandari Cross Transcript, pgs. 5, 7

¹⁸ Bhandari Cross Transcript, pg. 8

¹⁹ Broking Cross Transcript, pgs. 26-27

²⁰ Broking Cross Transcript, pg. 22-23; Carrelo 39.03 Transcript, pg. 53

²¹ Bhandari Cross Transcript, pgs. 28-30, 56

20. With no interested purchaser for Tacora with the Offtake Agreement in place, Greenhill, in consultation with others, designed a DIP solicitation process (the "DIP Process") which included a series of milestone dates and other guardrails to ensure fairness.²² No second DIP solicitation process was contemplated.²³

21. During the DIP Process, Greenhill, Tacora, and Stikeman Elliot prepared a "wish list" of modifications to the Offtake Agreement. The wish list included: (a) changing the term of the Offtake Agreement from life of mine to renewal-based to provide Tacora "greater flexibility";²⁴ and (b) increasing Tacora's profit share under the Offtake Agreement.²⁵

22. Greenhill received four proposals for DIP financing under the DIP Process.²⁶ One such proposal was not actionable,²⁷ including because it specified that the renegotiation or termination of the Offtake Agreement was a precondition to the delivery of a DIP offer.²⁸

23. Cargill submitted a non-binding DIP proposal, which expressly prevented the disclaimer of the Offtake Agreement.²⁹ Despite Tacora's precarious liquidity position and desperate need for DIP financing, Cargill ultimately withdrew from the DIP Process, and did not submit a bid capable of acceptance by the deadline (or at any time in the approximately one month thereafter).³⁰ In contrast, the AHG supported the Company by participating in the DIP Process, first submitting a non-binding DIP proposal on August 21, 2023 followed by a draft definitive DIP agreement on

²² Bhandari Cross Transcript, pg. 39-40

²³ Broking Cross Transcript, pg. 35

²⁴ Bhandari Cross Transcript, pg. 56-57

²⁵ Bhandari Cross Transcript, pg. 58-59

²⁶ Affidavit of Chetan Bhandari, sworn October 9, 2023, para 6

²⁷ Affidavit of Chetan Bhandari, sworn October 9, 2023, para 7

²⁸ Bhandari Cross Transcript, pg. 41

²⁹ Bhandari Cross Transcript, pg. 46

³⁰ Bhandari Cross Transcript, pgs. 45-46

August 28, 2023.³¹ The AHG DIP was then executed and became binding on September 11, 2023.³² The AHG DIP continues to be a binding obligation on Tacora.

24. Having failed to deliver a DIP proposal capable of acceptance, Cargill resorted to alternative measures to try to manipulate the DIP Process, including by withholding millions of dollars of payments due and owing to Tacora, exacerbating Tacora's liquidity crisis.³³ As set out in a demand letter from Tacora to Cargill dated September 8, 2023, the Company was forced to take steps to respond to Cargill's non-payment of critical amounts that were past due; Cargill's actions were, in the Company's own words, "further exacerbating the Company's dire liquidity position and jeopardizing its ability to continue operating in the ordinary course to the detriment of all stakeholders."³⁴

25. Notwithstanding Cargill's tactical maneuvering, at a Tacora Board meeting on or about September 11, 2023, Greenhill and others recommended that the Board approve the AHG DIP,³⁵ and advised the Tacora Board that the AHG DIP was workable, sufficient, and adequate for the purposes of the CCAA filing.³⁶ In spite of various concerns with respect to the AHG DIP raised by Cargill's appointee to the Board,³⁷ the Board unanimously approved the AHG DIP.³⁸

26. Mr. Bhandari subsequently swore an affidavit to support the Court's approval of the AHG DIP³⁹ which confirmed that, among other things: (a) the interest rate provided in the AHG DIP is

³¹ Affidavit of Thomas Gray, sworn October 16, 2023, Exhibit "I"

³² Affidavit of Thomas Gray, sworn October 16, 2023, Exhibit "G"

³³ Davies 39.03 Transcript, pgs. 75-76

³⁴ Exhibit 9 to the Examination of Leon Davies – Letter dated September 8, 2023 from Stikeman Elliott to Goodmans

³⁵ Bhandari Cross Transcript, pg. 47

³⁶ Davies 39.03 Transcript, pg. 79; see also Exhibit 1 to the Examination of Leon Davies - Minutes of the Meeting of the Tacora Board dated September 6, 2023.

³⁷ Davies 39.03 Transcript, pgs. 94-95

³⁸ Broking Cross Transcript, pg. 36

³⁹ Bhandari Cross Transcript, pg. 52

"lower than interest rates provided for in comparable DIP financings"; and (b) that the AHG DIP represented "the best terms that the Company could achieve in the circumstances based on the competitive DIP Process".⁴⁰ The AHG DIP was executed on September 11, 2023.

27. On the eve of an appearance before this Court for an initial CCAA order, which requested the approval of the AHG DIP, Cargill transferred \$6 million to its legal counsel and asserted that payment would only be made to Tacora in respect of amounts owing under the Offtake Agreement if Tacora reached a consensual resolution, including with Cargill.⁴¹

28. Notwithstanding Mr. Davies' testimony that Cargill works "collaboratively" with its customers, and that the "Cargill philosophy" is to work with its customers "to find a solution" and "help their business through difficult times",⁴² Mr. Davies ultimately conceded that it was not collaborative for Cargill to withhold payments when the Company was in a liquidity crisis:

Q. [...] You used the phrase "collaborative", that Cargill was acting collaboratively with Tacora. Do you recall using that phrase?

A. Yes.

Q. And that means working together for a common goal?

A. Correct.

Q. And do you consider that it was collaborative for Cargill to withhold payment to Tacora in September of 2023?

A. I think I've already answered that question.

Q. No, you haven't. Do you think --

A. I have.

Q. -- it was collaborative for Cargill to withhold payment from Tacora in September of 2023?

A. I do not.⁴³

⁴⁰ Bhandari Cross Transcript, pg. 53

⁴¹ Davies 39.03 Transcript, pgs. 100-101

⁴² Davies 39.03 Transcript, pgs. 118-119

⁴³ Davies 39.03 Transcript, pgs. 122-123

29. The other Cargill representative examined for this motion, Mr. Carrelo, remarkably asserted that withholding payments "didn't make a difference to Tacora at that time".⁴⁴

30. Even more remarkably, in the context of Cargill withholding payments from Tacora, Mr. Broking, Tacora's CEO, and Mr. Davies shared the following text message chain (that Mr. Davies alone retained a copy of):

Davies: When does this need to be done by btw?
Broking: Need bridge money by Monday
Or sooner
Need train payments also
Davies: Yep. Let's get ink on paper, you now Cargill will be good
Broking: **I love Cargill**⁴⁵

31. On cross-examination, Mr. Broking did not even attempt to resile from this statement, which he admitted he subsequently deleted⁴⁶ along with other text messages with Cargill representatives⁴⁷ that Cargill has refused to produce (as described below). He also testified that "Cargill has been a good partner to Tacora" but admitted that Tacora has "run losses for the last several years."⁴⁸

32. Despite Cargill successfully staving off a CCAA filing by breaching its contractual obligations to Tacora in order to exact concessions, without prejudice negotiations ensued between Tacora, Cargill, and the AHG, in an effort to find a path forward for the Company.⁴⁹ No consensual

⁴⁴ Carrelo 39.03 Transcript, pg. 63

⁴⁵ Exhibit 5 to the Examination of Leon Davies – Exchange of Text Messages between Mr. Broking and Mr. Davies [emphasis added]

⁴⁶ Broking Cross Transcript, pg. 77

⁴⁷ Broking Cross Transcript, pg. 81-82

⁴⁸ Broking Cross Transcript, pgs. 75-76

⁴⁹ Davies 39.03 Transcript, pg. 99

resolution was reached.⁵⁰

D. The Cargill DIP

33. Based on the terms of the DIP Process and the conduct of the Company and its advisors, the AHG reasonably believed that the DIP Process had closed and no further DIP financing would be considered from any person previously solicited to submit a proposal (including Cargill).⁵¹ But unbeknownst to the AHG, Greenhill approached Cargill – and Cargill alone – in late September regarding potential DIP financing. At the time, Tacora had a binding DIP agreement with the AHG,⁵² and Cargill was in possession of the AHG DIP, and knew exactly what it would have to bid against. Mr. Bhandari testified:

Q. As you told me earlier, Cargill was re-approached at this point?

A. Cargill was re-approached. I had re-approached Cargill at the end of September.

Q. At that point, Cargill had seen the terms of the Ad Hoc Group's DIP, hadn't they? The September DIP.

A. That is correct.

Q. So they knew what they were bidding against, didn't they?

A. They had the Ad Hoc Group DIP agreement, yes.

Q. In the August, September process that you designed, you were very careful to not let the parties see other parties' DIP proposal, right?

A. Correct.

Q. The reason for that is you create better deal tension by not disclosing the other bidder's potential bids, correct?

A. Correct.

[...]

Q. You didn't quite answer my question, sir. I'll put it to you again. In the August, September period, specifically, in early September, Greenhill went back to the Ad Hoc Group to improve its proposal even after Cargill had dropped out, correct?

A. Correct.

Q. Greenhill did not tell the Ad Hoc Group that Cargill had dropped out?

⁵⁰ Bhandari Cross Transcript, pgs. 35, 110

⁵¹ Affidavit of Thomas Gray, sworn October 16, 2023, Exhibit "I"; Bhandari Cross Transcript, pg. 71

⁵² Affidavit of Thomas Gray, sworn October 16, 2023, Exhibit "G"

A. Correct.

Q. It creates better deal tension if the Ad Hoc Group did not know that Cargill had dropped out, correct?

A. It would have created better deal tension.⁵³

34. Cargill then submitted a term sheet on October 5, 2023⁵⁴ (less than 24 hours before Tacora was intending to be in Court again to approve the AHG DIP), and continued to exert leverage over Tacora to try to manipulate the restructuring process, including by *again* withholding payments due and owing to Tacora.⁵⁵ The substance of an email chain between Mr. Broking of Tacora, and Mr. Kirk of Cargill, is reproduced below:

Broking: I am about to step into a BOD meeting and really need a confirmation that Cargill will pay for 10 trains. There are currently 10 trains that have been delivered to Port which we are requiring payment for first thing tomorrow morning. Please confirm by replying to this email that Cargill will pay for train deliveries tomorrow morning.

Kirk: **I confirm we will pay for 7 trains tomorrow on the basis that Tacora will not file for CCAA prior to the 10th of October 2023.** Please confirm by return.

Broking: We agree subject to Cargill agreeing to extend the APF and OPA. Please confirm

Kirk: **I can confirm we can extend the APF and OPA until 10th of October 2023, for the sake of clarity this is also on the basis that Tacora will not file for CCAA prior to the 10th of October 2023.**⁵⁶

35. Tacora's lawyers then wrote to the AHG's lawyers at 10:09 p.m. that same night requiring the submission of any new DIP proposal by the AHG by 5:00 p.m. on Saturday October 7, 2023, in the middle of the Thanksgiving long weekend.⁵⁷

36. Prior to October 5, 2023, the AHG were unaware that there was any competing DIP

⁵³ Bhandari Cross Transcript, pgs. 68-69

⁵⁴ Bhandari Cross Transcript, pg. 71

⁵⁵ Bhandari Cross Transcript, pg. 61

⁵⁶ Exhibit 2 to the Examination of Paul Carrelo – Emails between Mr. Broking and Mr. Kirk dated October 5 and 6, 2023

⁵⁷ Bhandari Cross Transcript, pg. 73

proposal, and had been working in good faith to update the AHG DIP to account for the passage of time in respect of the milestones and updates to schedules.⁵⁸ In contrast, between September 29 and October 5, 2023, Cargill representatives were in frequent contact with Mr. Davies regarding the Cargill DIP and Cargill's internal approval process.⁵⁹

37. Cargill submitted a binding DIP proposal on October 7, 2023.⁶⁰ Given the compressed timeline during the Thanksgiving long weekend, the AHG was unable to submit a further proposal, but reiterated its commitment to provide DIP financing on the terms of the already agreed-upon executed and binding AHG DIP, with necessary adjustments solely to account for the passage of time and other minor amendments requested by Tacora.⁶¹

38. Over the course of the Thanksgiving long weekend, the Tacora Board adopted the Cargill DIP.⁶² At no time was there any disclosure to the AHG regarding the terms of the Cargill DIP. Mr. Davies, Cargill's appointee to Tacora's Board, was present for, and participated in, *all* Board discussions regarding the terms of the AHG DIP and Cargill DIP, including the Cargill DIP vote.⁶³

39. Certain elements of the Cargill DIP are favourable.⁶⁴ However, there are also significant and irreversible flaws. *First*, as Mr. Bhandari conceded, the Offtake Default clause in the Cargill DIP prevents the disclaimer of the Offtake Agreement in the CCAA proceeding except in response

⁵⁸ Bhandari Cross Transcript, pgs. 72-73

⁵⁹ Davies 39.03 Transcript, pgs. 19-20

⁶⁰ Broking Cross Transcript, pg. 49

⁶¹ Affidavit of Chetan Bhandari sworn October 15, 2023 para 18; Affidavit of Thomas Gray sworn October 16, 2023, Exhibit "J"

⁶² Bhandari Cross Transcript, pg. 74

⁶³ Davies 39.03 Transcript, pgs. 88-90.

⁶⁴ Affidavit of Joe Broking, sworn October 15, 2023, Exhibit "C"

to a bid under the SISP process, and prevents a stalking horse bid that disclaims the Offtake Agreement, unless Cargill consents or the Cargill DIP is refinanced.⁶⁵ Mr. Bhandari testified:

Q. You've just told us that a stocking [sic] horse bid that disclaims the offtake is not possible, right? You just said that.

A. Unless -- it is possible if Cargill gives its consent or if Cargill's DIP is refinanced.

Q. Only if Cargill gives its consent?

A. Or if the Cargill DIP is refinanced with an alternative DIP.

Q. If the Cargill DIP is refinanced with a different term that doesn't include an anti-disclaimer term is what you're saying.

A. That is correct.⁶⁶

40. As Mr. Bhandari conceded, stalking horse bids are commonly used in insolvency proceedings, including because they set a floor on bidding and may create an additional level of deal tension that would not otherwise exist if there were no other bidders.⁶⁷ The AHG DIP contains no such term. Greenhill was aware that the AHG had expressed an intention to put forward a stalking horse bid.⁶⁸

41. While the First Report of the Monitor attempts to downplay the restrictions under the Cargill DIP in respect of the Offtake Agreement, it admits that a disclaimer "would be a breach of an affirmative covenant and an Event of Default unless such disclaimer related to a binding agreement arising from the Solicitation Process after the Bid Deadline."⁶⁹ In other words, the Cargill DIP improperly attempts to keep the Offtake Agreement in place for as long as possible.

42. *Second*, the proposed SISP Order under the Cargill DIP is flawed and highlights Cargill's ability to cause delay and keep its highly favourable and profitable Offtake Agreement in place as

⁶⁵ Bhandari Cross Transcript, pg. 82-83

⁶⁶ Bhandari Cross Transcript, pg. 83

⁶⁷ Bhandari Cross Transcript, pgs. 82-83

⁶⁸ Bhandari Cross Transcript, pg. 82

⁶⁹ First Report of the Monitor, para. 92.

long as possible. In the Company's Supplemental Application Record, the SISP Order was revised – presumably at Cargill's insistence – to authorize *but not direct* a solicitation process⁷⁰ notwithstanding: Greenhill's view that it is in Tacora's best interest that the solicitation process move forward without delay,⁷¹ a view that Mr. Davies reluctantly admitted on cross-examination was appropriate,⁷² and the Monitor's view that the SISP is a critical part of the CCAA proceeding.⁷³

43. *Third*, the fact that the Cargill DIP primes the Noteholders to the extent of the Cargill DIP⁷⁴ is improper and was not properly considered by the Board. Mr. Broking testified that it was extremely important that the DIP not prejudice other stakeholders:

Q. On the phone call with Mr. Lehtinen and Mr. Vuong on October 5, you did discuss a DIP or a potential DIP?

A. The question that was posed to the company was what would it take for -- well, first of all, he informed us that Cargill was considering soliciting a DIP and then the question was, you know, what would it take for that DIP to be considered. The only element of detailed terms regarding the DIP that we discussed -- and I made the crystal clear -- was that as it relates to the company's ability to run an open and unrestricted solicitation process in no way could a Cargill DIP prejudice any of the other stakeholders. We would have to be able to run an open solicitation process completely in order to maximize value for all of the stakeholders including our suppliers, trade credits and our -- and our employees.

Q. And you believed it was extremely important not to prejudice other stakeholders; is that right?

A. That's correct.⁷⁵

44. Notwithstanding this, Greenhill did not give the Tacora Board any advice on this point. As Mr. Bhandari testified:

Q. I'm asking you a different question. You did not give the board any advice in respect of the fact that the Cargill Inc. DIP primed the senior secured noteholders to the tune of \$75,000,000.00 or more, did you?

⁷⁰ Supplementary Application Record of Tacora Resources Inc., Tab 4

⁷¹ Bhandari Cross, pg. 89

⁷² Davies 39.03 Transcript, pg. 92

⁷³ First Report of the Monitor dated October 20, 2023, para 27

⁷⁴ Bhandari Cross Transcript, pg. 88

⁷⁵ Broking Cross Transcript, pgs. 60-61.

A. We -- I don't believe we pointed that out as a discussion topic.⁷⁶

45. Moreover, the priming of the Noteholders was not even a topic of discussion or consideration of the Tacora Board in approving the Cargill DIP⁷⁷ (despite the fact the AHG specifically raised the material prejudice that would be suffered by the Noteholders).⁷⁸

46. *Fourth*, in recommending the Cargill DIP, Greenhill failed to consider whether the permitted variances under the Cargill DIP accounted for professional fees in litigation, which creates a risk of default.⁷⁹

E. The KERP

47. Mr. Broking went to some lengths in his affidavit to assert that a KERP is "critical" to prevent skilled labour from departing Tacora to secure employment with nearby mining operations.⁸⁰ However, none of Tacora's unionized, hourly employees are included in the current KERP.⁸¹ The largest payment in the KERP is to Mr. Broking himself.⁸² In contrast, the AHG is proposing a KERP that proposes payments to rank and file employees,⁸³ i.e. the employees that Mr. Broking has testified are critical to retain.⁸⁴

F. Cargill's Representatives' Improper Refusals

48. In response to detailed notices of examination, the two Cargill employees examined produced a scant five documents. Counsel to the Cargill representatives made numerous improper refusals, including:

⁷⁶ Bhandari Cross Transcript, pgs. 88-89

⁷⁷ Davies 39.03 Transcript, pg. 64

⁷⁸ Affidavit of Thomas Gray sworn October 16, 2023, Exhibit "I"

⁷⁹ Bhandari Cross Transcript, pg. 79

⁸⁰ Affidavit of Joe Broking, sworn October 9, 2023, para 158

⁸¹ Broking Cross Transcript, pg. 65

⁸² Broking Cross Transcript, pg. 68

⁸³ Broking Cross Transcript, pg. 66-67

⁸⁴ Affidavit of Joe Broking, sworn October 9, 2023, para 158

- (a) to provide any Cargill analysis of Cargill's various agreements with Tacora, including the Offtake Agreement, the APF, the Stockpile Agreement and the Wetcon Agreement;⁸⁵
- (b) to provide Cargill's profit under the Offtake Agreement on an annual basis dating back to 2018;⁸⁶
- (c) to provide communications between Cargill employees and Tacora or its advisors;⁸⁷
- (d) to provide communications between Cargill employees relating to Tacora's restructuring;⁸⁸ and
- (e) to advise whether Mr. Carrelo *even looked* to see whether Cargill has conducted analysis regarding the implications of any disclaimer of the Offtake Agreement.⁸⁹

49. In virtually every instance, Cargill's representatives admitted that such documents exist, and that they were within their possession, power, or control.⁹⁰ Furthermore, in refusing to produce plainly relevant documents, Cargill's lawyers took the remarkable position that the only relevant period was "the last sort of week and a bit."⁹¹

PART III: ISSUES

50. This factum addresses the following issues:

- (a) Approval of the AHG ARIIO, including the AHG DIP, is appropriate and reasonable in the circumstances, in contrast to the Cargill DIP which ought not be approved; and
- (b) In the alternative, the AHG's alternative relief as set out in the Overview above and its Notice of Motion ought to be granted.

⁸⁵ Davies 39.03 Transcript, pg. 33, 36; 49; Carrelo 39.03 Transcript, pgs. 29-31

⁸⁶ Davies 39.03 Transcript, pg. 37

⁸⁷ Carrelo 39.03 Transcript, pg. 20

⁸⁸ Davies 39.03 Transcript, pg. 16-17

⁸⁹ Carrelo 39.03 Transcript, pg. 39

⁹⁰ See, e.g. Carrelo 39.03 Transcript, pgs. 20, 25, 30; Davies 39.03 Transcript, pgs. 33, 35, 37

⁹¹ Carrelo 39.03 Transcript, pg. 16

PART IV: LAW AND ANALYSIS

A. Approval of the AHG DIP is Reasonable and Appropriate

51. As set out in this Court's endorsement for the Initial Order, this motion is being heard on a *de novo* basis such that the Cargill DIP must be looked at in the first instance and in the context of the competing AHG DIP.⁹²

52. Approval of the Cargill DIP should be refused, and the AHG DIP approved, because:

- (a) the process leading to approval of the Cargill DIP was inherently flawed and unfair, compared to the AHG DIP which is a binding agreement stemming from the competitive DIP Process;
- (b) the Cargill DIP cannot meet the mandatory factors in ss. 11.2(4) of the CCAA; and
- (c) the Cargill DIP is being used for an improper purpose, namely furthering the interests of Cargill to the detriment of Tacora and its other stakeholders.

1. The Process Leading to the Cargill DIP was Improper

53. The Cargill DIP did not arise through the DIP Process (in which Cargill voluntarily chose not to put in a binding DIP proposal) or through any competitive and open process. It arose from Cargill manipulating Tacora's financial distress for its own benefit, and from being able to put forward a DIP proposal after having the benefit of reviewing the AHG DIP. The evidence demonstrates that Cargill leveraged its contractual relationship with Tacora to stave off the CCAA filing that would have requested approval of the AHG DIP, and to instead put forward the Cargill DIP that protects the Offtake Agreement for the sole benefit of Cargill.

⁹² Endorsement of Justice Kimmel dated October 10, 2023, para 7; [Great Basin Gold Ltd., Re](#), 2012 BCSC 1459 at paras [10-11](#)

54. It is trite that the directors of the Company have statutory and common law duties to act honestly, in good faith and in the best interests of the Company, and to avoid conflicts of interest between the Company and any opposing interests.⁹³ Yet the Board did not follow through on the binding agreement with the AHG that came out of the competitive DIP Process, nor did it follow proper corporate governance when Mr. Davies, the Cargill nominee on the Board, participated in the discussions that ultimately led to the approval of the Cargill DIP outside of the DIP Process.⁹⁴ Moreover, the Board did not even consider the proper factors in approving the Cargill DIP, including the fact it primed the Noteholders, a much more significant creditor than Cargill.⁹⁵

2. Factors in subsection 11.2(4) of the CCAA

55. The non-exhaustive considerations that must be considered by this Court are:

- (a) the period during which the company is expected to be subject to proceedings under this Act;
- (b) how the company's business and financial affairs are to be managed during the proceedings;
- (c) whether the company's management has the confidence of its major creditors;
- (d) whether the loan would enhance the prospects of a viable compromise or arrangement being made in respect of the company;
- (e) the nature and value of the company's property;
- (f) whether any creditor would be materially prejudiced as a result of the security or charge; and
- (g) the monitor's report referred to in paragraph 23(1)(b), if any.⁹⁶

56. These factors may be equally applicable in deciding who shall be the DIP lender and on what terms DIP financing ought to be provided.⁹⁷

⁹³ This was directly communicated to the Company in the letter dated August 16, 2023 – Affidavit of Thomas Gray sworn October 16, 2023, Exhibit “E”

⁹⁴ Davies 39.03 Transcript, pg. 100; Broking Cross Transcript, pg. 31

⁹⁵ Bhandari Cross Transcript, pgs. 88-89; Davies 39.03 Transcript, pg. 64

⁹⁶ [CCAA, s. 11.2\(4\)](#)

⁹⁷ [Great Basin Gold Ltd., Re.](#) 2012 BCSC 1459 at para [14](#)

57. The AHG DIP meets the above factors and was previously approved by the Board and supported in an affidavit for this Court's approval.⁹⁸ The Cargill DIP, on the other hand, on its face does not meet paragraphs (b), (c) and (f).

58. *First*, it does not provide for any changes to governance and in fact limits any such changes. The AHG DIP, on the other hand, requires the appointment of up to two independent directors if requested by the AHG.

59. *Second*, it is clear that the management of Tacora has entirely lost the confidence of its largest creditor, the Noteholders. And for good reason. The conduct of Tacora's Board, including the intertwinement with Cargill and the process leading to the Cargill DIP, is highly concerning.

60. *Third*, the Cargill DIP materially prejudices Tacora's largest creditor – the Noteholders – which critical factor was not even considered by the Board in approving the Cargill DIP despite it being expressly raised.⁹⁹ The First Report of the Monitor baldly asserts that no creditor will be materially prejudiced,¹⁰⁰ but does not provide any evidentiary basis for that conclusion.

61. The AHG recognizes it is a rare case where DIP financing does not cause some prejudice, but the Court must weigh any prejudice against the benefits of obtaining the DIP financing.¹⁰¹ In particular, the Court must satisfy itself that the benefits to all creditors, shareholders and employees outweigh the potential prejudice to some creditors.¹⁰²

⁹⁸ Davies 39.03, pg. 79; see also Exhibit 1 to the Examination of Leon Davies - Minutes of the Meeting of the Tacora Board dated September 6, 2023; Bhandari Cross, pg. 52-53

⁹⁹ Bhandari Cross Transcript, pgs. 88-89; Davies 39.03 Transcript, pg. 64; Affidavit of Thomas Gray, sworn October 16, 2023, Exhibit "I"

¹⁰⁰ First Report of the Monitor dated October 20, 2023, para 9(a).

¹⁰¹ [Great Basin Gold Ltd., Re](#), 2012 BCSC 1459 at para 194.

¹⁰² [AbitibiBowater inc., Re](#), 2009 QCCS 6453 at para 16.

62. There are only two economic stakeholders materially impacted by the Cargill DIP: the Noteholders and Cargill. Cargill is owed a fraction of what is owed to the Noteholders. As set out above, Cargill is owed approximately \$35 million and the Noteholders are owed approximately \$269 million. In other words, the Noteholders will be prejudiced to the factor of more than 7 times by the Cargill DIP – this plainly constitutes material prejudice. Moreover, no justification has been provided for this material prejudice. The Company and the Court have another option: the previously accepted, and binding, AHG DIP which does not have the same material prejudice.

63. It would be an *unprecedented* course of action for the largest senior secured creditor to be materially prejudiced through such a significant DIP financing, in circumstances where it is prepared to provide its own DIP agreement on reasonable terms – an agreement that was previously accepted and supported by the Company.

3. The Cargill DIP is being Used for an Improper Purpose

64. Courts are required to carefully and closely scrutinize financing proposals that may advance the interests of one particular stakeholder¹⁰³ and "be constantly vigilant against such strategies."¹⁰⁴ In the ordinary course, a DIP lender generally stands arm's length from the debtor and is chosen through a competitive process,¹⁰⁵ as was the case with AHG and the AHG DIP. As held by Fitzpatrick J. in *Great Basin Gold Ltd., Re*:

... the Court remains the gatekeeper in terms of ensuring that the terms of any such agreements are reasonable and appropriate in the circumstances. Input from stakeholders participating in the process will be critical although **the entire stakeholder group must be considered. Critical to the court's analysis will be evidence of the debtor company's actions in the face of these proposals. What is the underlying reason for these transactions? What due diligence was done in the face of these proposals? What**

¹⁰³ [Quest University Canada, Re](#), 2020 BCSC 318 at paras [97-99](#).

¹⁰⁴ [Great Basin Gold Ltd., Re](#), 2012 BCSC 1459 at paras [179-181](#).

¹⁰⁵ See [Laurentian University of Sudbury](#), 2021 ONSC 3272 at paras [62-63](#) (leave to appeal refused [2021 ONCA 448](#)) and [Conexus Credit Union 2006 v Voyager Retirement II Genpar Inc.](#), 2021 SKQB 273 at para [62](#); [Crystallex International Corp., Re](#), 2012 ONSC 2125 at paras [39](#) & [84](#) ((affirmed: [2012 ONCA 404](#)))

negotiations took place? What are the true consequences of not obtaining this relief? What alternatives, if any, are available?¹⁰⁶

65. Courts have expressed concerns, and denied relief, where a party has had involvement in the debtor entity and there are concerns regarding its intentions stemming from, among other things, inherent conflicts.¹⁰⁷ In *Quest University Canada*, a "reasonable inference" that efforts were intended for one party's own benefit were sufficient for the Court to conclude that a proposed course of action was unreasonably and inappropriately motivated.¹⁰⁸

66. In *Essar Steel Algoma Inc. et al, Re*,¹⁰⁹ the Court declined the debtor company's motion to approve a proposed extension of DIP financing after expressing concern that the DIP lenders were "imposing terms to assist their position as Term Lenders" who were party to a restructuring agreement, and that "their interests are now too closely aligned with what has been proposed and that the provision of DIP lending is now being too negatively affected".¹¹⁰

67. Similarly, in *Conexus Credit Union 2006 v. Voyager Retirement II Genpar Inc.*,¹¹¹ the Court expressed concern that the proposed interim lender was within arm's length of the debtors, was subordinate to another secured creditor, and played a central role in the day-to-day management and operation of the debtors. Among other things, the Court was concerned about the potential for mischief, including the proposed lender managing and operating the businesses for its own benefit, with "less than due regard" for the interests of the other secured creditor.¹¹²

68. As in those cases, the evidence before this Court, particularly with respect to the conduct

¹⁰⁶ *Great Basin Gold Ltd., Re*, 2012 BCSC 1459 at para [181](#) [emphasis added]

¹⁰⁷ *Quest University Canada, Re*, 2020 BCSC 318 at paras [70-73](#) & [99-100](#); *Essar Steel Algoma Inc., Re*, 2017 ONSC 3331 at paras [19-24](#)

¹⁰⁸ *Ibid.* at paras [99-100](#)

¹⁰⁹ [2017 ONSC 3331](#)

¹¹⁰ *Ibid.* at para [19](#)

¹¹¹ [2021 SKQB 273](#)

¹¹² *Ibid.* at para [63](#)

of Cargill leading up to the Cargill DIP, ought to give the Court pause in respect of this course of action. The evidence demonstrates that Cargill is trying to utilize the Cargill DIP as a way to protect its very profitable Offtake Agreement (that has been detrimental to Tacora and its restructuring efforts). Moreover, Cargill wears numerous hats and is in an inherent conflict in Tacora's restructuring; Cargill (along with its affiliates and related entities) is, among other things:¹¹³

- (a) the counterparty to the Offtake Agreement (the terms of which are not commercial and has been an impediment to potential buyers and investors in the Company);¹¹⁴
- (b) a technical advisor to the Company (where its employees have been working and continue to work onsite at the Company's operations);
- (c) a direct and indirect equityholder of the Company, and described as a "related party";
- (d) a creditor through various financing and credit agreements, including the APF;
- (e) a recent employer to the former Chief Operating Officer and Chief Commercial Officer of the Company; and
- (f) has had a representative on the Board for several years, including at various times when material amendments were made to the Offtake Agreement, and who participated in the Board meetings with respect to the Cargill DIP.¹¹⁵

69. If a party is acting in a manner that runs counter to the objectives of the CCAA or is acting for an improper purpose, the Court must intervene and exercise its direction to control the process.¹¹⁶ The Cargill DIP is being utilized to advance the interests of Cargill; this Court must

¹¹³ See paras 12-14 above.

¹¹⁴ Affidavit of Thomas Gray, sworn October 16, 2023, Exhibit "B"; Broking Cross Transcript, pgs. 26-27; Bhandari Cross Transcript, pg. 41

¹¹⁵ Affidavit of Thomas Gray, sworn October 16, 2023, Exhibit "I"; Davies 39.03 Transcript, pgs. 88-90

¹¹⁶ *Laurentian University v Sudbury University*, 2021 ONSC 3392 at para 20 (leave to appeal refused [2021 ONCA 488](#)); *9354-9186 Quebec Inc. v Callidus Capital Corp.*, 2020 SCC 10 at para 70. Overall, the approval of DIP financing is a matter of this Court's discretion, and the facts of this case are distinct from the circumstances in which challenges to DIP financing have not succeeded. As only a few examples: in *Re: Mobilicity Group*, 2013 ONSC 6167, contrary to this case, management had the support of the significant creditors and no creditors would be materially prejudiced

exercise its discretion and not approve the Cargill DIP for this reason alone. Moreover, as is now statutorily mandated in section 18.6 of the CCAA, all parties participating in a CCAA proceeding must act in good faith. Cargill's conduct raises serious concerns in this respect.

4. Adverse Inference

70. As set out above, Cargill's representatives failed to produce multiple categories of documents *that they admitted existed*, failed to respond to proper questions, and Tacora's CEO deleted text messages exchanged with Cargill.¹¹⁷ In these circumstances, the Court has wide discretion regarding the appropriate remedy.¹¹⁸ The AHG requests that the Court draw an adverse inference in respect of the documents and non-answers.¹¹⁹

B. Alternative Relief

71. Should this Court decide not to approve the AHG ARIO, the AHG is requesting five grounds of alternative relief, discussed briefly below.

72. *First*, a declaration that *any* DIP financing proposal not prevent or hinder the disclaimer of the Offtake Agreement. As set out above, the current terms of the Offtake Agreement are not commercial, are prejudicial to Tacora, and are prohibitive to an effective restructuring.

73. *Second*, a declaration that the AHG's terms for a KERP be implemented which will ensure that all critical employees are protected, contrary to the current KERP.

74. *Third*, approval of the appointment of a CRO. Given the significant concerns with how

as the secured creditors likely to be affected by the charge consented to it (paras [36](#) & [39](#)). *AbitibiBowater inc., Re*, 2009 QCCS 6453 at paras [16-20](#), demonstrating the large support for the DIP facility.

¹¹⁷ See paras. 48-49 above.

¹¹⁸ [Rule 34.15\(1\)](#) of the *Rules of Civil Procedure*, [RRO 1990, Reg 194](#)

¹¹⁹ AHG's Book of Authorities, Tab 1, *Indcondo Building Corp. v. Steeles-Jane Properties Inc.*, [2001] OJ No 3316 (Sup Ct), at para 7

management and the Board have run the restructuring thus far, the engagement of a CRO would be appropriate and essential to a successful restructuring of Tacora, and would instill much-needed confidence in the process.¹²⁰

75. *Fourth*, a declaration that any Ancillary Post-Filing Credit Extensions (as defined in the Cargill DIP) require the consent of the AHG or further Court order. The Ancillary Post-Filing Credit Extensions would result in an increase in debt that would further prime the Noteholders. In the circumstances, it is inappropriate for such further priming debt to be incurred solely with the Monitor's consent.

76. *Fifth*, a declaration that the transaction fee charge of US\$5.6 million for Greenhill rank above the SPNs only to the maximum amount of the GLC Fees (as defined in the AHG DIP). Greenhill originally agreed to a lower charge under the binding AHG DIP; this provision in the Cargill DIP provides Greenhill with a higher fee without any corresponding justification. It is therefore appropriate that the increase in financial benefit to Greenhill in the Cargill DIP, in contrast to the AHG DIP, not further prejudice the Noteholders by ranking above their security.

PART V: ORDER REQUESTED

77. The AHG requests that this Court approve the AHG ARIQ, including the AHG DIP. In the alternative, the AHG requests the five grounds of alternative relief outlined above and in its Notice of Motion.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 22nd day of October, 2023.



BENNETT JONES LLP

¹²⁰ [Victorian Order of Nurses for Canada, Re](#), 2015 ONSC 7371 at para [27](#); [Pascan Aviation inc., Re](#), 2015 QCCS 4227 at paras [3](#), [57-70](#).

APPENDIX "A"

CAST OF CHARACTERS & EXAMINED WITNESSES

Tacora Resources Inc. is an Ontario corporation; its sole operating asset is the Scully Mine near Wabush, Newfoundland and Labrador. Tacora produces a high grade iron-ore concentrate that commands a market premium, and for which there are interested buyers all over the world. Tacora's largest creditors are the Noteholders, which are owed approximately \$261 million in secured debt. At the first lien level, there is currently \$27 million of Senior Priority Notes outstanding. At the second lien level, there is currently \$225 million of Senior Secured Notes outstanding, plus over \$16 million in accrued and unpaid interest.

The AHG of Noteholders are the ad hoc group of holders of 8.250% Senior Secured Notes due May 15, 2026 and 9.00% Cash / 4.00% PIK SPNs due 2023, issued by Tacora. The AHG holds the majority of both series of Notes. The Noteholders are overwhelmingly Tacora's largest senior secured creditors, being owed greater than \$260 million – more than seven (7) times the amount owed to Tacora's other senior secured creditor, Cargill.

Cargill International Trading Pty. Ltd. is among other things, party to the Iron Ore Sale and Purchase Contract with Tacora, dated November 11, 2018 (as amended) (the "Offtake Agreement") and the Advance Payments Facility Agreement with the Company, dated January 3, 2023 (the "APF"). Cargill is owed approximately \$5 million at the first lien level under its Senior Secured Hedging Facility and \$30 million under the APF at the second lien level. Pursuant to the Offtake Agreement, Cargill purchases 100% of the iron-ore produced at the Scully Mine. The Offtake Agreement was amended in 2020 to extend the duration of the Offtake Agreement until the Scully Mine is no longer economically viable (i.e. it became a "life of mine" agreement).

Cargill, Incorporated is understood to be the ultimate parent company of Cargill International Trading Pty. Ltd. On October 10, 2023, Tacora obtained an initial order under the CCAA which included temporary DIP financing provided by Cargill, Incorporated. The secured debt of the Cargill, Incorporated (prior to the Cargill DIP) was nil.

Joe Broking has occupied the roles of President, CEO and Director of Tacora since October 2021. Prior to that, Mr. Broking was Tacora's EVP and CFO. Mr. Broking swore affidavits dated October 9 and 15, 2023, in support of the Cargill DIP. Mr. Broking previously swore an affidavit dated September 11, 2023 in support of the AHG DIP. Mr. Broking was cross-examined on October 19, 2023.

Chetan Bhandari is a Managing Director of Greenhill & Co. Inc. and Co-Head of Greenhill's Financial Advisory & Restructuring Group. Mr. Bhandari has been working with Tacora and assisting with its liquidity management and restructuring efforts since Greenhill's engagement in January 2023. Mr. Bhandari swore affidavits dated October 9 and 15, 2023 in support of the Cargill DIP. Mr. Bhandari previously swore an affidavit dated September 11, 2023 in support of the AHG DIP. Mr. Bhandari was cross-examined on October 18, 2023.

Leon Davies is a Cargill employee, and has been for over 10 years. Mr. Davies is currently the Sustainability Lead and Atlantic Customer Lead in the Metals Division of Cargill. From approximately 2016 to 2020, Mr. Davies was the Cargill day-to-day manager of the relationship

with Tacora. Prior to being Cargill's appointee to Tacora's Board, Mr. Davies was Cargill's representative observer to Tacora's Board. Mr. Davies was involved, on behalf of Cargill, in the negotiation with Tacora of the Offtake Agreement, its amendments, as well as other agreements between Cargill and Tacora. Prior to being appointed to Tacora's Board by Cargill, Mr. Davies had no experience serving as a Board member of a company. Mr. Davies was examined under Rule 39.03 on October 18, 2023.

Paul Carrelo is a Senior Structuring Manager at Cargill who works closely and communicates regularly with Mr. Davies. Mr. Carrelo reports to Lee Kirk. Mr. Carrelo was examined under Rule 39.03 on October 19, 2023.

SCHEDULE "A"

LIST OF AUTHORITIES

Cases Cited

1. [9354-9186 Quebec Inc. v Callidus Capital Corp.](#), 2020 SCC 10
2. [AbitibiBowater inc., Re](#), 2009 QCCS 6453
3. [Conexus Credit Union 2006 v Voyager Retirement II Genpar Inc.](#), 2021 SKQB 273
4. [Crystallex International Corp., Re](#), 2012 ONSC 2125
5. [Crystallex International Corp., Re](#), 2012 ONCA 404
6. [Essar Steel Algoma Inc., Re](#), 2017 ONSC 3331
7. [Great Basin Gold Ltd., Re](#), 2012 BCSC 1459
8. *Indcondo Building Corp. v Steeles-Jane Properties Inc.*, [2001] OJ No 3316 (Sup Ct)
9. [Laurentian University of Sudbury](#), 2021 ONSC 3272
10. [Laurentian University of Sudbury \(Re\)](#), 2021 ONCA 448
11. [Pascan Aviation inc., Re](#), 2015 QCCS 4227
12. [Quest University Canada, Re](#), 2020 BCSC 318
13. [Re: Mobilicity Group](#), 2013 ONSC 6167
14. [Victorian Order of Nurses for Canada, Re](#), 2015 ONSC 7371

SCHEDULE "B"

TEXT OF STATUTES, REGULATIONS & BY – LAWS

COMPANIES' CREDITORS ARRANGEMENT ACT, R.S.C., 1985, C. C-36

Interim financing

11.2 (1) On application by a debtor company and on notice to the secured creditors who are likely to be affected by the security or charge, a court may make an order declaring that all or part of the company's property is subject to a security or charge — in an amount that the court considers appropriate — in favour of a person specified in the order who agrees to lend to the company an amount approved by the court as being required by the company, having regard to its cash-flow statement. The security or charge may not secure an obligation that exists before the order is made.

Priority — secured creditors

(2) The court may order that the security or charge rank in priority over the claim of any secured creditor of the company.

Priority — other orders

(3) The court may order that the security or charge rank in priority over any security or charge arising from a previous order made under subsection (1) only with the consent of the person in whose favour the previous order was made.

Factors to be considered

- (4) In deciding whether to make an order, the court is to consider, among other things,
- (a) the period during which the company is expected to be subject to proceedings under this Act;
 - (b) how the company's business and financial affairs are to be managed during the proceedings;
 - (c) whether the company's management has the confidence of its major creditors;
 - (d) whether the loan would enhance the prospects of a viable compromise or arrangement being made in respect of the company;
 - (e) the nature and value of the company's property;
 - (f) whether any creditor would be materially prejudiced as a result of the security or charge; and

(g) the monitor's report referred to in paragraph 23(1)(b), if any.

RULES OF CIVIL PROCEDURE, RRO 1990, REG 194

Sanctions for Default or Misconduct by Person to be Examined

34.15 (1) Where a person fails to attend at the time and place fixed for an examination in the notice of examination or summons to witness or at the time and place agreed on by the parties, or refuses to take an oath or make an affirmation, to answer any proper question, to produce a document or thing that he or she is required to produce or to comply with an order under rule 34.14, the court may,

- (a) where an objection to a question is held to be improper, order or permit the person being examined to reattend at his or her own expense and answer the question, in which case the person shall also answer any proper questions arising from the answer;
- (b) where the person is a party or, on an examination for discovery, a person examined on behalf or in place of a party, dismiss the party's proceeding or strike out the party's defence;
- (c) strike out all or part of the person's evidence, including any affidavit made by the person; and
- (d) make such other order as is just.

**IN THE MATTER OF THE *COMPANIES' CREDITORS ARRANGEMENT ACT*, R.S.C.
1985, c. C-36, AS AMENDED AND IN THE MATTER OF A PLAN OF COMPROMISE
OR ARRANGEMENT OF TACORA RESOURCES INC.**

(Applicant)

**ONTARIO
SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)**

**PROCEEDINGS COMMENCED AT
TORONTO**

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